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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 17.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

CENTRAL PACIFIC RAILWAY COMPANY.

BRIEF FOR APPELLEE.

Statement of the Case.

This suit was filed by the Central Pacific Railway Company, a corporation, against Franklin K. Lane, as Secretary of the Interior, and Clay Tallman, as Commissioner of the General Land Office, to enjoin said public officials from *cancelling* an *indemnity* selection of certain lands in California (90 acres in area), made and filed under the provisions of an act of Congress, approved July 25, 1866 (14 Stat., 239).

By that act Congress made a grant of lands to aid in the construction of a *railroad*, the grant embracing *two* classes of limits: one, *primary* or *place;* and the other, *indemnity*, to supply *losses* sustained from the primary or place lands because of some *prior* lawful claim or right that had *attached* thereto.

The lands in suit, 90 acres, were selected by the railway company February 24, 1910, under the *indemnity* grant, *supra*, by list duly and regularly filed in the United States local land office at Redding (now Sacramento), California; the selection was certified March 5, 1910, by the officers at said local land office, as being in all respects regular and in conformity to law and Departmental regulation; and, furthermore, said list was *approved* by said local officers (R., 13); and thereupon, was transmitted by them to the General Land Office for appropriate consideration and ultimate patenting of the lands to said company (R., 7).

The list remained there pending, without any action having been taken thereon, until January 16, 1915, when the Commissioner of the General Land Office held the same for *rejection* and *cancellation*, upon the ground, and upon that ground only, that the tracts embraced therein, *subsequent* to their selection, had been included in what is known as Power-site Reserve No. 232, created and established by Executive order of November 25, 1911, and *withdrawal* thereunder made by said Commissioner December 9, 1911; said withdrawal having been made under the assumed authority of a certain act of Congress, approved June 25, 1910 (36 Stat., 847), hereinafter more particularly referred to; the action of the Commissioner, in holding said list for rejection, as above, being *affirmed* thereafter by the Secretary of the Interior (R., 8-9).

A *chronological* statement is attached, which will indicate, in concise form, the order of events having a material bearing herein.

Pleadings.

The bill of complaint filed herein set forth the pertinent and applicable facts, and specifically alleged that, at the date of the filing of the selection list aforesaid, the lands so sought as indemnity were vacant, unappropriated, non-mineral in character, free and clear of and from the claim of any person whomsoever, and were not embraced in any reservation theretofore made by the President of the United States, by Congress, or by any of the Executive departments of the Government of the United States; that the tracts so selected were needed in partial satisfaction of the railroad grant; that good, sufficient and valid base was designated of tracts in equal area lost within the primary or place limits of the grant; that the list of selections was accompanied by the fees collectible by law; and that every requirement of the rules and regulations of the Department of the Interior, in respect of making and filing railroad indemnity selection lists, was met (R., 6-7); that the selection was duly certified, both as to the selected tracts and the base designated therefor, by the respective registers and receivers of the local land offices concerned (R., 12-13); and, finally, that the situation above outlined was maintained and continued thereafter, until November 25, 1911, when the tracts so selected were attempted to be included within the limits of power-site reserve No. 232 (R., 8).

The defendants interposed motion to dismiss the bill, thereby admitting the facts above recited; and, in the motion, asserted and contended that, until formal approval by the Secretary of the Interior of a railroad indemnity selection list, the railroad selector acquires and has no right in the lands so selected as against the United States, and that the latter may freely make other disposition thereof for its own uses and purposes, as was done and accomplished, (so the

defendants insisted,) by including the selected tracts within the limits of the power-site reserve aforesaid. The motion further insisted that the relief sought would be an interference with the functions of the Secretary, in a matter involving the exercise of his judgment and discretion; and, further, that the United States is a necessary party to the suit (R., 15-16).

The motion to dismiss was sustained by the trial court, upon the stated ground that no vested right as against the United States is acquired until the actual approval of the list of selections; and decree was entered accordingly (R., 16-17).

Upon appeal by the railway company, the Court of Appeals reached a different and opposite conclusion; and reversed the decree of the trial court, and directed the entry of decree in favor of plaintiff, appellee herein (R., 21-32).

From that decree, the present appeal was taken (R., 36); the propositions relied upon by appellants being, briefly:

> (*a*) No rights are acquired as against the United States under a railroad indemnity selection list until *approval* thereof by the Secretary of the Interior.
>
> (*b*) The withdrawal and inclusion of the lands in a power-site reserve was authorized, and constituted a bar to the approval of the selection list.
>
> (*c*) The United States is a necessary party to the suit.

The above several propositions so relied upon by appellants will be considered in the order stated.

At the outset it may be proper to call attention to the fact that there are now pending before this court several other cases involving similar or related questions, namely:

> No. 18, Northern Pacific Ry. Co. (involving railroad indemnity selections).
>
> No. 128, State of New Mexico (involving State lieu selection).

No. 257, State of Wyoming et al (involving State lieu selection).
No. 325, Northern Pacific Ry. Co. (involving railroad indemnity selection).

The consideration of the propositions above stated will be limited to the particular facts involved in this appeal; the facts and the law applicable thereto being somewhat different in the other said cases.

The Question.

The ultimate question involved in this suit may be thus summarized:

The railway company contends that its right to any particular tract of land within the *indemnity* limits of the grant attaches upon the *selection* thereof; and that the *status* of such land *at the time of selection*, or, as it has been expressed by this court, "at the moment of choice," determines whether the selecting company is entitled to patent therefor. In other words, if such indemnity lands at the time of selection be within the indemnity limits, and are vacant, unappropriated, non-mineral in character, and free from any lawful adverse claim, and be not then embraced within any other appropriation or reservation theretofore made by or on behalf of the United States; and the selection be supported by good, sufficient and valid base; and all requirements of law and Departmental regulation be complied with (all of which conditions are conceded to be here present), the railroad grantee is entitled to the lands so selected.

The appellants, on the other hand, assert and insist that, notwithstanding the fact that a railroad indemnity selection list may be absolutely regular, valid and in good standing *at the time when made* (as is concededly here the case); nevertheless, the United States, at any time thereafter, prior to actual *approval* by the Secretary of the Interior of such

selection list, may make other appropriation of the lands so selected, and devote the same to its own uses and purposes, adverse to the grant, and thereby cut out and defeat the selection.

In stating the above respective contentions, there is excluded from consideration every other element than that above indicated (*e. g.*, whether valid and sufficient *base* has been offered in support of the selection; whether the lands selected are *non-mineral* in character, etc.); and this for the reason that absolutely nothing is involved in this case, in any way affecting the validity or integrity of the indemnity selection involved herein, other than the question hereinabove referred to. In other words, the appellee is entitled to the lands in suit, unless the power-site reserve, created subsequently to the indemnity selection, stands in the way.

While the instant case involves but 90 acres of land, the issue herein presents a question of exceeding importance, not only to appellee, but to all land-grant railroads as well where such grants contain, as many of them do, a provision for *indemnity* lands to supply *losses* sustained within primary or place limits. If the Secretary of the Interior may take away *any* part of the *indemnity* grant in the face of a pending lawful selection list, he, from time to time, may take away *other* parts thereof; and, in the same manner, he may take away from the company the *unpatented* portion of its indemnity grant in its *entirety*, in so far as the same may not be embraced in *approved* selection lists.

The mere statement of any such power or authority as is claimed by appellants herein, so violative of the contract and property rights of appellee, and for which the Government has received full consideration, at once suggests the necessity for careful and serious consideration.

Before discussing the legal questions involved, the provisions of the *land grant* should be fixed in mind.

The Land Grant.

By act of Congress, approved July 25, 1866 (14 Stat., 239), entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," authority was given to the California and Oregon Railroad Company, a corporation organized and existing under the laws of the State of California, to construct a railroad and telegraph line, under certain conditions and stipulations as expressed in said act; and by the *second* section of said act a grant of land was made to certain corporations named in the act, including specifically said California and Oregon Railroad Company, said grant being thus:

> "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line;" etc.

The above constituted the grant of *primary* or *place* lands. Said section of the act then thus proceeded:

> "and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections;" etc.

The above constituted the *indemnity* grant.

Section *four* of the act provided for the issuance of patents to the company upon completion of twenty or more consecutive miles of railroad and telegraph line ready for the

service contemplated by the act, upon report thereof made to the President of the United States by the three commissioners by him to be appointed, such patents to be for the lands granted to the extent of and coterminous with the completed section of the railroad and telegraph line;

> "and from time to time whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued."

Section *five* of said act provided, in part:

> "And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States."

And by section *ten* of said act, all *mineral* lands (other than those containing coal and iron) were *excepted* from the grant.

Said California and Oregon Railroad Company accepted the grant so made to it, as above, and filed its assent in that behalf; and, thereafter, it duly constructed and completed a line of railroad from Roseville, California, to the California-Oregon State line, within the time limited therefor (as extended by a certain further act of Congress, approved June 25, 1868, 15 Stat., 80); and the same was accepted by the President of the United States, after sworn report by the commissioners, as required by the granting act aforesaid; and each, every and all of the conditions, stipulations

and requirements of said land-grant were and have been fully met and satisfied (R., 3).

The Central Pacific Railway is the legal successor in interest of all the rights, titles, properties and franchises of the above-named California and Oregon Railroad Company, including the certain land grant aforesaid; and, as such successor aforesaid, is entitled to the issuance of land patents in its name (R., 4; see, also, Central Pacific Railway Company *et al.*, 29 L. D., 589).

By the provisions of a certain other act of Congress, approved March 3, 1887 (24 Stat., 556), the Secretary of the Interior was "authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted;" and although the fact is that the railroad of said California and Oregon Railroad Company, provided for in the granting act of July 25, 1866, *supra*, has been fully constructed, completed, equipped and operated for a great many years, with all of the incidental benefits to the United States, as fixed and provided by said granting act, the land grant itself remains unadjusted (R., 4-5).

BRIEF.

1.

The Statutory Contract Effected by the Land-Grant Act of July 25, 1866.

The act of July 25, 1866, *supra*, was one entitled—

> "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon."

In order to develop the vast area comprised within the United States, Congress, long years ago, concluded that railroads were needed, both for governmental purposes, such as the transportation of the mails, troops, munitions of war, and public stores and property, and to open up and develop the public lands of the United States by individual settlements thereon; but the railroad construction that was necessarily involved in the enterprise was of such vast magnitude that it was difficult to interest private capital therein without aid of some kind offered by the Government. The latter owned enormous areas of undeveloped, unprofitable, as well inaccessible lands, but which could be made immensely valuable by railroad construction.

The so-called Pacific Railroad laws all related to the same general subject, and the great national object sought to be accomplished by the land-grant acts, namely, the building of transcontinental railroads, is no longer a subject of inquiry in this court.

U. S. *ex.* Union Pacific R. R. (91 U. S., 72, 80).
U. S. *vs.* Stanford (*Id.*, 412, 427).

Thus it was that the Government, through its Congress, desiring to promote railroad construction as above, offered, not freely, but for a consideration, to assist in the matter by a grant of certain *odd*-numbered sections of public land (retaining to itself the intervening *even*-numbered sections, the market value of which it at once doubled), upon condition, however, so far as appellee's grant is concerned, that the railroad should furnish *free transportation* for all time of Government property and troops, as well as certain other benefits and privileges set forth in the granting act, *supra*.

That was the offer, and it was accepted in the manner prescribed, and the company thereupon constructed and equipped the required railroad, and it has ever since operated the same. Furthermore, the railroad company has faithfully kept its part of the contract in all respects, and

has furnished *free transportation* for Government property and troops during the long years that have followed, and in addition, the United States has received and enjoyed all of the other benefits and privileges fixed and provided by the granting act, not to mention the incidental benefits of enormous value that resulted from the construction and operation of the railroad.

Some idea of the magnitude of the above provision and requirement for the free-haul of Government troops and property, for all time, may be gathered from the record in the case of Oregon and California Railroad Company *et al. vs.* United States (238 U. S., 393; volume 5 of the record therein, p. 2404, and Exhibit 288, volume 13, p. 6825).

Having thus fixed in mind some of the practical details of this land-grant contract, and the consideration paid therefor and being paid by appellee, it may be well to consider the legal aspect of the contract.

The nature of the statutory contract between the Government, grantor, on the one hand, and the railroad company, grantee, on the other, has been settled beyond question by prior decisions of this court.

That the contract effected by the land-grant acts is one from which the companies cannot depart, and which the Government cannot change or alter, except in the mode reserved to it by law, was long ago settled by this court in the Sinking Fund Cases (99 U. S., 700, 718-19), where the following was stated on the opinion:

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation

> to aid in the construction of its railroad. * * * The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for subsidy bonds, without the consent of the corporation. All this is indisputable."

The above rule of decision has never been changed, and, in the more recent case of Weyerhaeuser *vs.* Hoyt (219 *U.*, 380, 387), the following was stated as to just what Congress intended to confer in making the indemnity grant:

> "It is beyond dispute on the face of the granting act of July 2, 1864, c. 217, 13 Stat., 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat., 378, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits."

Again, in the case of Burke *vs.* Southern Pacific R. R. (234 *Id.*, 669, 680), wherein was involved a land grant similar to the one here under consideration, this court, in its opinion, referring to the contention there advanced on the part of mineral claimants to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly, thus stated:

> "The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right

and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. *It accepted in the mode contemplated by the act and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both.* Menotti *vs.* Dillon, 167 U. S., 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant should not be treated as a mere gift." (Italics by counsel.)

Again, in the case of Oregon and California R. R. *et al.*, *vs.* U. S. (238 *Id.*, 393, 427), the following was stated:

> "We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command, and are operative and obligatory until repealed."
>
> See, also, Wisconsin Central R. R. *vs.* Forsythe (159 *Id.*, 46, 55, 60).

It may be noted in passing that while it is the settled rule of this court that public grants are construed strictly against the grantees, the rule itself is subject to the limitation that they are not to be so construed as to defeat the intent of the legislature or to withhold what is given either expressly or by necessary or fair implication: Winona and St. Peter R. R. *vs.* Barney (114 U. S., 618, 625).

Thus, in U. S. *vs.* Denver and Rio Grande R. R. (150 *Id.*, 1, 14) it was stated:

> "When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

This case, therefore, is to be viewed in the light of the *contract* entered into between the Government and the railroad grantee, the terms of which are binding upon each, and from which neither can depart, save only to the extent, and in the manner, if at all, reserved in the contract.

Starting with the thoroughly established premise, *supra*, it is important, at the outset, to consider that contract in respect of the land grant, and just when the rights of the grantee attach to the lands so granted; and which may be thus stated:

2.

The rights of a railroad grantee as to any specific tract attach (a), as to primary or place lands, upon the filing of map of definite location; and (b), as to indemnity lands, upon selection.

As already noted, the grant under which this controversy arises (and which is quite similar in terms to many other railroad land grants made by Congress) was of *lands* within certain prescribed limits *to aid* in railroad construction. And, as has also been indicated, the grant had a two-fold field of operation, (*a*) lands within *primary* or *place* limits and (*b*) lands within *indemnity* limits, to supply *losses* sus-

tained in the primary or place limits brought about by some *prior* lawful claim thereto.

The first and fundamental question that presents itself in connection with such land grants is, When do the rights of the railroad grantee *attach* to any specific tract of land?

(*a*) *As to primary or place lands:*

There is here no difficulty or uncertainty, since it was long ago adjudged, and the rule of decision has since been repeatedly affirmed, that the rights of the railroad grantee become fixed and vested, in the first instance, at the date of filing the map of definite location of the road opposite thereto; *after which*, no rights adverse to the grant are permitted to attach to any specific tract.

Van Wyck *vs.* Knevals (106 *Id.*, 360, 366).

Kansas Pacific Ry. *vs.* Dunmeyer (113 *Id.*, 629, 634-5).

Further citation of authority upon the proposition above stated is unnecessary, as the rule of decision has been thoroughly settled and uniformly followed, both in the Interior Department and in the courts.

Under the phraseology of such land-grant acts there was no particular difficulty in fixing the exact point of time at which the rights of a railroad grantee should *attach* as to any specific tract of land within *primary* or *place* limits, because, upon the ascertainment of the limits of the grant by the filing of map of *definite location*, it thereby became precisely known whether such primary or place lands were *then* free to pass to the company under the grant, and which thereof, if any, were *then* subject to some *prior* lawful claim that operated to *exclude* them from the grant.

(*b*) *As to indemnity lands:*

Having ascertained, by the application of the above rule of decision, that certain tracts were *lost* to the grant, the

provisions of the *indemnity* grant came into play, and gave the railroad grantee the right *to select*, in lieu of the tracts so *lost*, other tracts of *equal area* and within certain *prescribed limits*.

But at what point of time can it be said that the rights of the railroad grantee definitely *attach* and become *fixed* (subject only to *prior* lawful claims) as to any specific tract within the *indemnity* limits? That, of course, is the real question here involved and presented for determination.

At the outset it is important to fix in mind just what the granting act here under consideration (July 25, 1866, 13 Stat., 365), provided in respect of the duty and authority of the Secretary in administering the grant. That act provided that the indemnity selections shall be made "under the direction of the Secretary of the Interior." Similar provisions are found in other railroad land grants made by Congress (*e. g.* Northern Pacific, 13 Stat., 365; Southern Pacific, 14 *Id.*, 292; Oregon Central, 16 *Id.*, 94; Texas Pacific, 16 *Id.*, 573). The word "approval" was not used in those acts.

In some of the land grants made by Congress to the States in aid of railroad construction, the right of indemnity selection was made to be subject "to the *approval* of the Secretary of the Interior (*e. g.*, to the State of Michigan, 11 Stat., 21; to the Territory of Minnesota and to the State of Alabama, *Id.*, 195; to the State of Wisconsin, 13 *Id.*, 66).

On the other hand, certain other acts of Congress providing for lieu selections of lands contain no express provision concerning either direction or approval by the Secretary of the Interior (*e. g.*, act of June 22, 1874, for the relief of settlers on railroad lands; act of June 4, 1897, forest lieu selections; R. S. U. S., 2275-6, State lieu selections; etc.); and yet it could hardly be seriously contended that any of such selections could be lawfully made otherwise than under the supervision and direction of the Secretary of the Interior.

As a matter of fact, a provision of the kind stated, where and when it appears in the granting acts, merely puts in

formal language that which doubtless would be implied without express statement, namely, the general *supervision* with which the Secretary of the Interior is charged in administering the public lands of the United States, including as well the various land grants made by Congress, both public and private. Bishop of Nesqually *vs.* Gibbon (158 U. S., 155, 167).

As a mere matter of departmental procedure, there is practically no difference between primary lists and indemnity lists. Both alike, if in order, come finally before the Secretary in the form of what are termed "clear lists;" and, upon his written approval, the clear list forms the basis of the land patent. Both classes of selections, primary and indemnity, therefore, come under the *direction* of the Secretary; and there would seem to be no good reason to accord to the supervisory direction of the Secretary a greater efficacy in the one class than the other; the true test being, and necessarily so, whether the selection list constituted and was, in fact, a lawful selection *at the time it was filed;* and the ascertainment of the Secretary is, of course, properly directed to that matter.

It surely could never have been intended or contemplated by Congress to vest in the Secretary any right or discretion to accept or reject a perfectly valid and regular indemnity selection list; since, if that were so, what was supposed and certainly intended by Congress to be an absolute grant would be nothing more than a mere conditional grant dependent upon the grace of a public official.

Furthermore, it is to be observed that the title of the railroad grantee to any specific tract or tracts within the indemnity limits is acquired by virtue of the grant, although that is made definite by the selection.

This matter should be fixed in mind, as appellants herein seem to insist its necessary effect, that an approval by the Secretary *creates* the right of the indemnity selector; whereas,

the fact is that the right is found in the land grant itself, made definite and given precision as to any particular tract or tracts by selection thereof duly filed; and the *direction* of the Secretary authorized and required by the land-grant act is simply in ascertainment of the right so theretofore created, as above.

And here it is important to note that, apparently from the beginning of the administration of railroad grants, the Interior Department has charged the local land officers with the duty of carefully and critically examining selection lists filed by railroad grantees; it provided the forms for verification of such lists, and which forms include certificate by the local officers of approval (or otherwise) of the list. (See Departmental Circular No. 15, of January 24, 1867; ditto, of October 15, 1873; ditto, of November 7, 1879; also Regulations of September 22, 1902; etc.) Thus, in the instant case, the local officers certified that "the said list has been filed and approved" (R., 13).

So that the *direction* of the Secretary in respect of the selection list assumes definite form, in the first instance, by the action and decision of his authorized representatives in respect thereof. This, therefore, presents a different situation from the regulations adopted by the Department under the forest lieu act of June 4, 1897, where rule 18 directed the local officers to forward all such applications to the General Land Office for consideration, together with report of the status of the tract applied for. (See Cosmos Co. *vs.* Gray Eagle Co., 190 U. S., 301, 310.)

In developing the matter as to the exact point of time when the rights of the company *attach* under an indemnity selection, it may be useful to consider briefly the departmental administration of railroad land grants as to lands within indemnity limits as the same has obtained during the years.

The land grant here involved, and indeed all similar railroad land grants made by Congress, contained a provision,

in substance, that, upon the filing in the office of the Secretary of the Interior of a map of survey of the railroad, or of any portion thereof not less than a certain number of continuous miles from either terminus (in the present act 60 miles), said Secretary should *withdraw* from sale public lands therein granted on each side of the railroad, so far as located *and within the limits specified.*

Acting under the supposed authority found in such land grants, of the general character just stated, the Secretary of the Interior, from time to time, made withdrawals of lands within *both* primary and indemnity limits; this upon the theory that the granting acts so intended and directed. Had those various withdrawals remained effective as to *indemnity* lands, there would have been no difficulty in preserving to railroad grantees *all* of the lands within *indemnity* limits, unimpaired by the initiation of adverse claims, up to the time when such company selected the same to supply losses.

Later on, however, the Interior Department reached the conclusion that Congress, in making the several railroad land grants, only intended to authorize the withdrawal of lands within primary limits, and did not intend to tie up, for an indefinite period, lands within *indemnity* limits. Accordingly, in 1887, all such withdrawals were vacated and the lands restored (Atlantic & Pacific R. R., 6 L. D., 84, 92-3; *Id.*, 131-133; Northern Pacific R. R. vs. Miller, 7 *Id.*, 102); ; and the above determination and action received the approval of this court, in Hewitt *vs.* Schultz (180 U. S., 139, 157).

...It is interesting to note, however, that the Department in its above changed practice recognized the *prior* right of railroad indemnity selections actually pending at the time of the restoration of the lands so formerly embraced in the withdrawals (Dinwiddie *vs.* Florida, etc., Ry., 9 L. D., 74).

Some of the railroad land grants have been so far adjusted by the Department that it is a present ascertained and determined fact that insufficient lands within indemnity limits

remain to supply losses of primary or place lands; *for example*, the Northern Pacific grant (St. Paul and Pacific R. R. *vs.* Northern Pacific R. R., 139 U. S., 1, 19).

That, however, is not the situation of the present land grant, since, thus far, a deficiency in the indemnity grant has not yet appeared; although, if the departmental action herein be upheld, it will be possible for the Government to apply to its own uses and purposes all or any part of the remaining lands within the indemnity limits in so far as the same may not be embraced in *approved* selection lists.

In cases of this kind, therefore, it is necessary to determine and fix some exact point of time at which it may properly be said that the rights of the railroad grant definitely attach to a specific tract of land within the indemnity limits of the grant.

Eliminating from consideration the fact that the Interior Department, in its earlier administration of railroad land grants, made withdrawals of lands within indemnity limits (a practice subsequently revoked *supra*), it may be stated that the Interior Department has uniformly held: (1) that the right of a railroad grantee does not attach to any specific tract of land within indemnity limits *until selection* thereof; and (2), that the *status* of the tract *at the time of such selection* determines the right, or otherwise, of the grantee to the tract so selected.

That rule of decision has been so frequently announced and followed by said Department that it will only be necessary to refer to a few of its decisions.

Thus, in the case of Missouri, Kansas & Texas Ry. Co. *vs.* Beal (10 L. D., 504), the rule was thus stated (syllabus):

> "Prior to selection, the right to indemnity lands is only a float; and the right acquired by selection is dependent upon the *status* of the lands *at date of selection*, and not at date of withdrawal." (Italics by counsel.)

Again, in the case of Southern Pacific R. R. (32 *Id.*, 51, 53-4) the following was stated:

> "In fact, a railroad *indemnity selection*, presented in accordance with departmental regulations and accepted or recognized by the local officers, *has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws.*"

Without further pursuing the inquiry so far as departmental decisions are concerned, the same rule was again stated in—

Santa Fe Pacific R. R. (33 *Id.*, 161-2).
Northern Pacific Ry. (37 *Id.*, 260, 262).

Having considered the uniform construction placed by the Interior Department upon railroad *indemnity* grants, it next becomes important to ascertain just what construction this court has given to such grants.

Apparently the first leading decision (and which has since been cited many times with approval) wherein the question came directly under review, is that of Ryan *vs.* Central Pacific R. R. Co. (99 U. S., 382, 386), decided in 1878 (and which case, it may be interesting to note, involved the identical *indemnity* land grant here in question). There, this court, speaking of section two of the granting act of July 25, 1866, *supra*, thus stated:

> "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts *until the selection was actually made in the manner prescribed.* (Italics by counsel.)

In other words, it was there held, that the right of the railroad grantee to a specific tract of land within *indemnity*

limits depends upon the *status* thereof *at the time of such selection.*

Pausing at this point for a moment, it may be remarked that, notwithstanding the fact that the railroad grantee bought and paid for its land grant, both primary and indemnity, and will continue to make further substantial payments for it for all time to come in the shape of *free transportation* of Government property and troops, as hereinabove indicated; it is confronted with a situation in respect of its *indemnity* lands that doubtless was never contemplated by Congress when it made the grant, and certainly was not contemplated by the railroad grantee when it entered into the statutory contract aforesaid; but which has been brought about by settled rules of decision no longer open to question; and that situation may be thus stated:

The railroad grantee can acquire no rights in any specific tract of *indemnity* land until actual *selection* thereof; and if, *at that moment of time,* some other lawful claim has attached thereto, or the Government itself has made some other disposition or reservation thereof, that particular tract of indemnity land is *lost* to the grantee.

But that is *not* all: the railroad grantee is not permitted to make selection of *indemnity* (nor indeed of primary) lands *until* the same have been *surveyed* by the Government and a plat of the survey, duly approved, filed in the United States local land office (Northern Pacific R. R., 15 L. D., 8); nor is such grantee permitted to identify either primary or indemnity lands (for purposes of selection) by *private* survey made by it in advance of the Government survey (United States *vs.* Montana Lumber Mfg. Co., 196 U. S., 573).

Furthermore, large areas of the public domain within the limits of railroad land grants, even at this late day, remain *unsurveyed;* and thus it is that the grantee thereof has to await the approved official survey thereof before it can file

its selection lists; and that subjects the grantee to the further risk of loss of its *indemnity* lands by *private* settlement thereon made *prior* to survey, settlement claims being permitted in favor of the settler even on *unsurveyed* lands, and thereafter the latter is given precedence over railroad indemnity selections filed upon survey, as above.

When to all of the above is added the claim here asserted by appellants, namely, in the face of a pending *lawful* indemnity selection made by appellee, the tracts may be taken from it and reserved by the Government for its own uses and purposes, the real substance of the intended grant disappears and leaves but the shadow, and this, too, notwithstanding the fact that this Court has expressly adjudged—

> "that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits."
>
> (Weyerhauser *vs.* Hoyt, *supra.*)

Resuming now the consideration of decisions by this Court following the case of Ryan *vs.* Central Pacific R. R. Co., *supra*, in relation to railroad indemnity grants.

In Grinnell *vs.* R. R. Co. (103 U. S., 739, 742), it was held:

> "As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer."

In the case of Cedar Rapids, &c., R. R. *vs.* Herring (110 *Id.*, 27, 39), this court, speaking of the *indemnity* lands, stated:

> "They are not and cannot be made specific until the grantee's right of selection has been exercised."

In the case of Kansas Pacific R. R. *vs.* Atchison, &c., R. R. Co. (112 *Id.*, 414, 421) the following was stated:

> "The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from the defendant's road, upon certain contingencies. *It gave no title to indemnity lands in advance of their selection.*" (Italics by counsel.)

In the case of St. Paul, &c., R. R. *vs.* Winona, &c., R. R. (*Id.*, 720, 733), the rights of the railroad company as to indemnity were adjudged to have become "vested by its selection of those lands."

In Barney *et al. vs.* Winona & St. Peter R. R. (117 *Id.*, 228, 232), the court, speaking of lands within *indemnity* limits, thus stated:

> "The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, *and the title to which accrues only from the time of their selection.*" (Italics by counsel.)

In Sioux City, etc., R. R. *vs.* Chicago, Milwaukee, etc., R. R. (117 *Id.*, 406, 408), the court stated:

> "But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

Next is the case of Wisconsin Central R. R. *vs.* Price County (133 *Id.*, 511-12). In that case there was involved a grant of lands made by Congress to the State of Wisconsin, May 5, 1864, to aid in the construction of three distinct lines of railway between certain designated points. The grant contained provision for indemnity, in lieu of lands lost to the grant within place limits, the selection thereof to be made by an agent or agents of the State, appointed by the governor thereof; the indemnity selection, however, being

expressly made to be "subject to the approval of the Secretary of the Interior."

One of the questions involved in the case related to the claimed right of the county to tax, as the property of the railroad, lands embraced in pending unapproved railroad indemnity selection lists. The exact character of the decision, in respect of said claimed right of taxation, is sufficiently indicated by the following extract from the opinion therein:

> "But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the Commissioner of the General Land Office to require the company to restore this excess to the Government."

And, again, speaking of the authority and duty of the Secretary in such case, it was stated:

> "This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identi-

> fication; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. *The doctrine, that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court.*" (Italics by counsel.)

Appellants in the instant case seek to give controlling effect to the opinion in the foregoing case as having general application, rather than as having special reference to the particular facts there present. Under the facts of that case, the language employed in the opinion was most pertinent and applicable; but no such situation of fact is involved herein. Here the selecting company is admittedly entitled to the very indemnity lands selected, unless the subsequently created power-site reserve stands in the way.

In United States *vs.* Missouri, Kansas & Texas Ry. Co. (141 *Id.*, 358, 374-5), the following was stated, speaking of the *status* of indemnity lands in railroad grants:

> "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes."

In New Orleans Pacific Ry. Co. *vs.* Parker (143 *Id.*, 42, 57-8), it was stated:

> "As to lands within the indemnity limits, it has always been held that no title is acquired until the

specific parcels have been selected by the grantee, and approved by the Secretary of the Interior."

In Hewitt *vs.* Schultz (180 *Id.*, 139) the court considered at length the various decisions of the Interior Department showing the construction placed by that department upon railroad land grants; and, among other things, thus held (*syliabus*):

> *"until a valid selection by the grantee was made from the lands within the indemnity limits,* they were entirely open to disposition by the United States, or to appropriation under the laws of the United States for the disposition of the public lands." (Italics by counsel.)

Again, in the case of Southern Pacific R. R. Co. *vs.* Bell (183 *Id.*, 675, 682), the court, after reviewing its prior decisions, announced the following conclusion as deduced therefrom:

> "That to lands within the indemnity limits, the company takes no title until a deficiency in the place limits has been ascertained and the company has exercised its right of selection, with perhaps some rare exceptions."

In the case of Clark *vs.* Herington (186 *Id.*, 206, 209), the following was stated:

> "It is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in *Kansas Pacific Railroad vs. Atchison Railroad,* 112 U. S., 414, 421: 'Until selection was made the title remained in the Government, subject to its disposal at its pleasure." (Citing cases.)

In Oregon & California R. R. *vs.* U. S. (189 *Id.*, 103, 113) the following was stated:

> "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary."

Next followed the case of Sjoli *vs.* Dreschel (199 *Id.*, 564). In that case, the filing of the railroad indemnity selection list preceded the homestead entry in the land office, but the homestead settlement, improvement and cultivation of the land antedated the filing of the indemnity selection. While it is of no immediate importance whether settlement and improvement should confer a right, notwithstanding the failure to enter in the land office; nevertheless, it may be said in support of the settler's right in that case, that the primary grant there involved excepted lands "occupied by homestead settlers," or subject to "other claims or rights." The conditions present in said case, therefore, would have excepted the land had it been within the primary limits, instead of the indemnity limits; and to assume that the same conditions would not except land from an indemnity selection would be to assert a higher and more extensive right under the indemnity provisions than was accorded to the primary provision upon which the indemnity right is based. When the facts of the case are understood the reason for the final holding becomes apparent; although the general language used in the opinion, to the effect that an unapproved railroad indemnity selection list did not stand in the way of the lands being occupied and entered under the homestead laws, led to some subsequent confusion and error on the part of other courts, until later corrected by this court, in the case of Weyerhaeuser *vs.* Hoyt, *supra*, wherein, speaking of the decision in said Sjoli-Dreschel case, it was stated:

> "If it be conceded that general language was used in the opinion in that case which when separated from its context and disassociated from the issues

> which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohens *vs.* Virginia, 6 Wheat., 399, so often since reiterated and expounded by this court, to the effect that 'General expressions in every opinion 'are to be taken in connection with the case in which 'those expressions are used. If they go beyond the 'case, they may be respected, but ought not to control 'the judgment in a subsequent suit when the very point 'is presented for decision.' The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the Sjoli case are not persuasive here clearly results from the demonstration which we have previously made that to apply them would be in effect to destroy the indemnity provisions of the granting act."

The next case in order is that of Osborn *vs.* Froyseth (216 *Id.*, 571); but, in so far as the decision therein was based upon the general language contained in the decision in Sjoli *vs.* Dreschel, *supra*, the matter has been sufficiently explained above, and need not be repeated.

So far as concerns railroad *indemnity* selection lists, next came the case of Weyerhaeuser *vs.* Hoyt, *supra* (the decision wherein will be referred to more at length later on). In the opinion in that case, speaking of such selections, the following was stated:

> "The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made."

And, again, speaking of the power and duty to approve lists of selections conferred and imposed upon the Secretary, it was stated:

> "Possessing that attribute, the authority involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the filing of the list of selections."

The case of United States *vs.* Southern Pacific R. R. Co. (223 *Id.*, 565, 570) is instructive as well as indicative that the doctrine so repeatedly announced by this court is still recognized and followed. The court there stated:

> "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice."

The subsequent case of Stalker *vs.* Oregon Short Line R. R. Co. (225 *Id.*, 142), involved conflicting claims between a pre-emption patent and an approved railroad right of way; and, in announcing the established principle that patent for railroad indemnity lands is effective, by relation, as of the date of the filing of the railroad company's list of indemnity selections, it was added:

> "While no vested right against the United States is acquired until the actual approval of the list of selections, the company does acquire a right to be preferred over such an intervener."

And, finally, in the case of Northern Pacific Ry. *vs.* McComas (250 *Id.*, 387, 393), it was held, that the approval or disapproval by the Secretary of the Interior of railroad lieu land selections is not merely a formal act, but involves the exercise of sound, but not arbitrary, discretion.

The above is intended and believed to be a substantially full list of the prior cases wherein railroad *indemnity* selection lists have come under review by this court; and pertinent extracts from the decisions therein have been quoted for the purpose of convenient reference; and this quite irrespective of whether some of the expressions used therein, if given general application, when separated from the context and facts of the particular case in which the statements were made, make for or against the appellee in the instant case.

It will be observed that, in the decisions above noted, the court sometimes used the expression "selection"; sometimes it spoke of a "selection under the *direction* of the Secretary"; and, again, it referred to a "selection with the *approval* of the Secretary"; but, when those decisions are carefully analyzed, it will be seen that the court fixed upon the *status* of the lands *at the time of indemnity selection* as determining whether the railroad rights *attached* thereto; and when it added the words "under the *direction*," or "with the *approval*" of the Secretary, as it did in some of such cases, it was in recognition of the right of the Secretary (and which is not here controverted), to ascertain and determine whether the selection itself was lawful *at the time it was made*. Nothing is found in any of the above cases recognizing, in the slightest degree, any arbitrary or discretionary right in the Secretary to reject an indemnity selection list that was lawful at the time it was made; and in the instant case it is conceded that the indemnity selection was lawful at the time it was made and at all times thereafter (R., 6-7).

Furthermore, the cases above referred to involved conflicting claims between a railroad grantee and a prior or subsequent settler or entryman, or controversies growing out of conflicting railroad grants; or claim made by a State of its right to tax lands embraced within pending railroad indemnity selection lists; none of them involved the determination of the question here present, where appellants

claim the right to ignore and defeat a pending indemnity selection, rights under which had *attached* in favor of the selecting company, and which selection was absolutely lawful at the time it was made.

The underlying thought, as well expression, in all of the above cases is, that no legal right, on the part of the railroad grantee, is initiated or attaches *until* the filing of an indemnity selection list; and that, at that point, the Secretary is charged with duties that are referred to in the case of Wisconsin Central R. R. *vs.* Price County, *supra*, and which are quasi-judicial in their nature; but that barring such matters (none of which are here present), and if the indemnity selection list be regular, lawful and valid at the time it is made (as it here was and is), the mere matter of its approval by the Secretary is ministerial, involving no reserved discretion in that official to reject the selection and devote the lands to some other purpose, be it private or public, adverse to the railroad grant.

In the brief for appellants filed herein the contention is confidently made that this court, in its said prior decisions, has always meant an "approved selection," and that, in the absence of such approval, the selecting company has acquired no right of any kind which need be respected, save only as concerns the attaching of subsequent private rights, and that the Secretary may withhold his approval to a list otherwise entitled to approval, and apply the lands so selected to the uses and purposes of the Government itself. If that be so, the land-grant contract is clearly not that which it purports and certainly was supposed and intended to be.

Said brief, however, makes no mention of the contract feature of the case and contents itself with the assertion that a lawful railroad indemnity selection means one which has received the Secretary's approval, without which the selection has no binding force against the United States, and that, inasmuch as the selection list in the instant case has never been approved, it must fail.

Having in mind what has been so heretofore decided in respect of railroad indemnity selections, the matter may be further developed in the light of the rights of the selecting company, on the one hand, and the power, authority and duty of the Secretary of the Interior, on the other; and to which matter we now turn.

3.

The rights of the railroad grantee having lawfully attached to the tracts here in suit, no power or authority is reserved to or vested in the Secretary of the Interior to devote such lands to other purposes and uses, either public or private, foreign to and in hostility with the grant thereof made by Congress.

From what has now been stated, it results that the *status* of lands within the *indemnity* limits of railroad grants *at the time of the selection thereof*, or, as otherwise expressed by this court, *"at the moment of choice,"* is the exact point of time at which is to be determined whether such selected tracts are or are not excluded from the operation of the grant.

In the Sinking Fund Cases (99 U. S., 700, 718), it was stated:

> "No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

In the case of Wisconsin Central R. R. *vs.* Forsythe (159 U. S., 46, 60), this court stated:

> "When Congress makes a grant of a specific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land," etc.

In the case of Burke *vs.* Southern Pacific R. R. (234 *Id.*, 669, 680), this court having stated that, by acceptance of the provisions of the land-grant act, the parties were brought into such contractual relations that the terms thereof became obligatory on both, thus proceeded:

> "And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described."

And, again, in the later case of Weyerhaeuser *vs.* Hoyt (219 *Id.*, 380, 387), it was stated:

> "It was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits."

In the above case the Northern Pacific Ry. Co. had filed an indemnity selection list covering certain lands; thereafter one Jones applied to purchase the same lands under the timber and stone act, made his final proof, paid the required purchase money, and received receipt from the local land office. Subsequently, however, the Secretary of the Interior approved said railroad indemnity selection list and issued patent to it, and the company conveyed the lands to Weyerhaeuser. Jones assigned his rights to Hoyt, and controversy then arose between Weyerhaeuser and Hoyt as to their respective rights. The United States Circuit Court of Appeals (regarding the above Sjoli-Dreschel case as authoritative and controlling) decided against the grantee of the railway company; and thus it was that this court was called upon to review its said former decision and to determine whether it was to be regarded as a statement of the law applicable generally, or whether it should be limited in application to a situation of fact such as was present in said

Sjodi-Dreschel case. This court reached the conclusion that the lower court had erred; and having, explained the true import and meaning of its decision in said former case (but which need not here be repeated), stated, as follows:

> "The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection when made should not include lands which at that time were subject to the rights of others. The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the Secretary."

Later on came the decision in Daniels *vs.* Wagner (237 *Id.*, 547, 557-8). That case involved a forest lieu selection, made under the act of June 4, 1897; and the question involved was "whether the Land Department had a right to reject a prior lieu land entry or entries, and award the land to subsequent and subordinate applicants, under the assumption that it possessed a discretionary right to do so, an authority, the possession of which was sustained by both of the courts below."

This court thus disposed of the contention so made:

> "In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded, *a*, that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the land office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation and upon the doing and offering to do everything required by the law or the lawful regulations of the Land Department to be done or offered to be done for

> that purpose; *b*, that in the particular case the application to enter the lieu land came within the grant of the statute and all that was required by law or lawful regulation was done by the applicant in order to obtain entry, and, *c*, that it was the plain duty of the proper authorities of the department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the department to permit the entry, the department is authorized in its discretion to refuse to allow that to be done which is commanded to be done and thus deprive the individual of the right which the law gives him. And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. *When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation.*" (Italics by counsel.)

From the above extended review of the decided cases, it would seem to result (certainly since the decisions in Weyerhaeuser *vs.* Hoyt and Daniels *vs.* Wagner, *supra*), that this court has authoritatively settled, in necessary effect, the following propositions:

> (1) The *status* of lands within *indemnity* limits *at the time of selection*, or, as otherwise expressed, at the *moment of choice*, determines the right thereto, or otherwise, of the railroad grantee;

(2) The right of the railroad grantee *attaches* to *indemnity* tracts where the selection thereof was lawful *at the time it was made;*

(3) The requirement that such indemnity selections shall be made "under the direction of the Secretary of the Interior," or under his *approval*, imposed upon that official the duty of ascertaining and determining whether the selections were lawful *at the time they were made;*

(4) Where the selecting company comes within the grant of the statute (as it here does) and has done all that was required by law or lawful regulation in order to make and perfect its indemnity selection (as it here did), *it becomes the plain duty of the Secretary, under the law, to grant it;* and, finally,

(5) The title of the railroad grantee to lands within indemnity limits is acquired by virtue of the land grant, although made definite by the selection, and the direction of the Secretary of the Interior in respect of such indemnity selections, and his action thereunder, is not the source or creation of title of the company to the lands so selected.

The language of this court in the Daniels-Wagner case, *supra*, may be appropriately repeated here, where, referring to the *discretionary* right there claimed by the Secretary to approve or reject a pending lieu-selection list that was itself perfectly lawful, valid, and in good standing; and, having stated the certain conclusions to which reference is above made, the following was added:

> "When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. * * * When the true character of

the proposition is thus fixed, it becomes unnecessary to go further to demonstrate its want of foundation" (p. 558).

Thus carefully did the court safeguard the rights secured to a forest lieu selector, where the transaction was simply one of mutual exchange of lands of equal value between such selector and the Government; how much stronger are the reasons for applying the same rule and doctrine to the case of a railroad grantee that paid full consideration for the land grant, not only in constructing the railroad, but in the matter of furnishing *free transportation* to the Government for all time for its property and troops, as it is required to do by the terms of the grant (Sec. 6 of the act, *supra*).

Having thus demonstrated that when Congress specified that these railroad indemnity selections should be made "under the direction of the Secretary," it did not clothe that official with any *discretionary* power to reject arbitrarily a *lawful* indemnity selection, it becomes important to consider whether Congress itself would have the right to deprive the railroad grantee of its land grant, or any part of it, where the rights of the latter have attached to specific lands; as well, also, to consider whether Congress has even attempted to do so as to the lands here in suit.

4.

Congress cannot lawfully deprive the railroad grantee of any part of its "indemnity grant" where the rights of such grantee have attached by lawful selection; and, furthermore, the act approved June 25, 1910 (36 Stat., 847), commonly referred to as the Pickett Act, has no proper application in the instant case.

Bearing in mind that this land grant is both a law and contract, and that by performing its part of the contract

the railroad grantee is entitled to performance by the Government, it becomes evident that Congress would have no right to make any change in the title created by the grant of the lands, without the consent of the grantee; and, even conceding that the indemnity grant was in the nature of a float (as expressed in some of the decisions, *supra*) and that, *prior* to a lawful selection made of *indemnity* lands, other disposition may be made thereof (as held, *supra*); nevertheless, it is perfectly well settled, as has been shown above, that the indemnity grant was intended by Congress to be a *substantial* right to land to make up losses sustained in the primary limits; and, that the rights of a railroad grantee to any specific tract or tracts of indemnity land *attach* and become affixed upon a *lawful* selection made thereof, and of which it may not thereafter be deprived.

Thus, in the early case of Wilcox *vs.* Jackson (13 Pet., 498, 513), decided in 1839, this court laid down a rule of decision (ever since followed) in these words:

> "But we go further, and say that, wheresoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

In the instant case, the railroad company had earned the lands here in suit; it identified them by *selection;* and it did everything that was required of it by law or lawful regulation as a prerequisite to the evidence of its title by patent; and the Government, for a valuable consideration, had solemnly agreed to issue the patent. Instead of doing so, however, the Interior Department finally concluded that it would retain the lands for possible power-site purposes,

and thus deprive the railroad grantee of that part of its grant.

This Government contract with the railroad is a title to lands, and title is property. While it is true that the Government is not constitutionally inhibited, as are the States, from passing laws impairing the obligations of contracts; and in a certain sense, it may be said that executory contracts with the Government rest for their support and enforcement upon the sovereign *conscience;* nevertheless, this Court has held, in no uncertain terms, that the United States cannot divest to itself property rights that have vested under a contract.

To permit the Interior Department to take these indemnity lands from appellee, under the facts disclosed by this record, would amount to a recognition of the right of the Government to take the private property of the company for a public use without its consent and without compensation.

It has been shown above that a railroad indemnity selection, presented in accordance with departmental regulations, and accepted or recognized by the local officers, has been uniformly recognized by the land department "as having the same segregative effect as a homestead or other entry made under the general land laws." (Southern Pacific R. R., 32 L. D. 53-4; Santa Fe Pacific R. R., 33 *Id.,* 161-2.)

And that statement received the express approval of this court, by quotation thereof, in its opinion in the case of Weyerhaeuser *vs.* Hoyt, *supra,* (p. 392).

Bearing in mind a situation of the kind embraced in the quotation, and which is precisely the situation here present, the following extract from the opinion of this court, in Shepley *vs.* Cowan (91 U. S., 330, 338), is instructive:

> "the power of regulation and disposition conferred upon the Congress by the Constitution only ceased when all the preliminary acts *prescribed* by law for the acquisition of the title, including the payment

> of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived."

Without further quotation from the cases decided by this court, the following may be cited to the same effect:

Buxton *vs.* Traver (130 U. S., 232, 236).
Campbell *vs.* Wade (132 *Id.*, 34, 38).
Northern Pacific R. R. *vs.* Smith (171 U. S., 260, 268-9).

The cases most frequently cited in support of propositions to the contrary, similar to those advanced by the appellants herein, are:

Frisbie *vs.* Whitney (9 Wall., 187).
Yosemite Valley Case (15 *Id.*, 77).

But neither of those cases is here controlling, since here the selecting railroad company had done all that the law and departmental regulations required and exacted of it to secure the selected lands; whereas, the exact contrary was the situation of fact involved in each of the above cases.

It is, therefore, submitted that, under the facts of this case, and the applicable law, no subsequent adverse disposition of the lands can be made lawfully; and it is submitted that the act of Congress, approved June 25, 1910, *supra*, commonly referred to as the Pickett Act, did not justify the inclusion of these lands in a power-site reserve; and this is so because, *prior* to the passage of the act, and, of course, *prior* to the subsequently created power-site reserve, the lands, by their indemnity selection, as above, had been removed from the category of "public lands."

For the purpose of convenient reference, a copy of said Pickett Act is printed in the appendix hereto.

That act was one entitled:

> "An act to authorize the President of the United States to make withdrawals of public lands in certain cases."

In the body of the act the President was authorized to withdraw temporarily from "settlement, location, sale or entry, any of the *public lands* of the United States * * * and reserve the same for water-power sites," etc.

Not only were the provisions of the act limited in operation to *public lands* of the United States, but, it is to be noted, the same do not even profess to operate on any "selection" of railroad lands, primary or indemnity. Therefore it is quite evident that Congress, in said act, had neither thought nor intention of interfering with lands that distinctly and specifically it had appropriated long ago to aid in railroad construction.

Furthermore, it is thoroughly settled that *general* terms employed in a *subsequent* grant will not be construed as applicable to lands embraced within the terms of a *prior* grant:

> Wilcox *vs.* Jackson, *supra.*
>
> Lake Superior, &c., Co., *vs.* Cunningham (155 *Id.*, 354, 373), and cases cited.

Lands situated as are those here in suit do not fall within the general definition of the term "public lands," as found in the decisions of this court, such as Newhall *vs.* Sanger, (92 U. S., 761, 763); Bardon *vs.* Northern Pacific Ry. (145 *Id.*, 538, 543); and they are specifically removed from that category by the departmental decisions in Southern Pacific R. R. (32 L. D., 51, 53) and Santa Fe Pacific R. R. (32 *Id.*, 151), hereinabove cited, and which express holding to that effect was quoted by this court, with approval, in Weyerhaeuser *vs.* Hoyt, *supra.*

It would seem clear that said act of June 25, 1910, neither has nor was intended to have any application whatever to *indemnity* lands theretofore granted to aid in railroad construction, where such lands were actually embraced in pend-

ing selections, lawfully made and filed; but even if the language of that act can be strained so as to make it apply by implication, it can have no application to the instant case, since here the tracts had been segregated from the "public lands" of the United States by their *indemnity* selection by appellant February 24, 1910, almost four months *before* the passage of said act of Congress and upwards of two years *before* the attempted withdrawal and inclusion of said tracts in a temporary power-site reserve.

It follows, of course, that the action of appellants, and of which complaint is made in this case, finds no lawful support in the Departments's erroneous application herein of said act of 1910.

5.

The attempted inclusion of the lands here in suit in a power-site reserve, created subsequent to the indemnity selection thereof, should be treated as a nullity; and appellee is entitled to the relief sought herein in protection and preservation of its property rights.

In St. Paul, etc., R. R. Co. *vs.* Winona, etc., R. R. Co., *supra,* there was an overlapping land grant made to *two* railroad companies; one thereof filed its selection list of indemnity lands, while the other, without filing any such list, received patent from the Interior Department, the latter having acted upon the theory (erroneous, as it turned out) that it was entitled thereto by reason of *prior* railroad construction. This court, however, held in favor of the company whose selection list had been *filed,* although not approved, stating that it was no answer to say that the Secretary certified lands to the State for the use of the company, since he did so under a mistake of law, and that his erroneous decision could not deprive the railroad company of its rights "which became vested by its *selection* of those lands"; to which were cited numerous prior decisions of this court.

Again, in the case of Burfenning *vs.* Chicago, St. Paul, etc., Ry. (163 U. S., 321, 323), this court having affirmed the established rule of decision that questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final, added the following:

> "But it is also equally true that when by act of Congress a tract of land has been reserved for homestead and pre-emption, or dedicated to any special purpose, proceedings, in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

And, again, in the case of Wirth *vs.* Branson (98 *Id.*, 118, 121), the following was stated in the opinion:

> "The rule is well settled, by a long course of decisions, when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside."

Without further pursuing the matter, it may be stated that the same principle was announced in the later case of Lake Superior, &c., Co. *vs.* Cunningham (155 U. S., 354, 373-4), wherein the numerous prior decisions of this court to the same effect are cited with approval.

It is equally well settled by decisions of the same court that the officials of the Land Department are subject to the

jurisdiction of the courts whenever necessary to preserve and protect the property rights of the citizen.

Thus in the case of Cornelius *vs.* Kessel, 128 U. S., 456, 461), the court thus stated the rule:

> "the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secured a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it" (p. 461).

Again, in the case of Garfield, Secretary of the Interior, *vs.* Goldsby (211 *Id.*, 249, 262) the same doctrine was thus stated:

> "there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

And, finally, in the case of Ballinger, Secretary of the Interior, *vs.* Frost (216 *Id.*, 240, 249) the following was stated:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the

Secretary, he, as all others, is bound by the provisions of congressional legislation."

See, also, School of Magnetic Healing *vs.* McAnnulty (187 *Id.*, 94, 108); Phila. Co. *vs.* Stimson, Secretary, (223 *Id.*, 605); Lane, Secretary *vs.* Watts, (234 *Id.*, 525, 540).

It is therefore respectfully submitted, that jurisdiction properly exists in the courts to protect the railway company in its property right in the lands here in suit; and that the decree sought by the appellee herein in preservation and protection of its rights was entirely proper.

In conclusion, and in reply to the suggestion made by the appellants herein, as it was also made before the Court of Appeals below, the following is quoted from the decision rendered by said Court of Appeals:

> "Nor is there merit in the suggestion that this is a suit against the United States, and the court is therefore without jurisdiction. The term 'public lands,' as used in our legislation, describes lands subject to sale or other disposition under general laws. Newhall *vs.* Sanger, 92 U. S., 761; Bardon *vs.* Northern Pacific Ry. Co., 145 U. S., 535; United States *vs.* Buchanan, 232 U. S., 72, 76. It logically follows that when lands have passed out of the public domain and become vested in an individual or corporation they are no longer property of the United States. An action, then, to compel the officers of the Government to perform the duty prescribed by law in recognizing the rights so vested, is neither an action against the United States, nor an action affecting property belonging to the United States. It will not do to say that the injunction will have the effect of nullifying an executive order. If the order was made without lawful authority, it was a mere nullity and entitled to no consideration as against rights already vested. The proper remedy in such cases is by injunction. Lane *vs.* Watts, 234 U. S., 525, 540" (R., 31).

6.

Conclusion.

It is respectfully submitted that the decree below was correct, and should be *affirmed*.

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APPENDIX.

ACT OF CONGRESS, APPROVED JUNE 25, 1910 (36 Stat., 847).

An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates; *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: *And provided further,* That there shall be excepted from the

force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made; *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

CHRONOLOGY.

1866, July	25. Granting act, primary and indemnity lands, to California & Oregon R. R. (14 Stat., 239).
1870, August	22. Consolidation of California & Oregon R. R. with Central Pacific R. R., under name of latter company.
1899, July	29. Central Pacific *Railway* Company succeeded to all of the rights above consolidated companies, including the land grant, *supra*, and all patents were directed by the Secretary of the Interior to issue in the name of said successor company (29 L. D., 589).

1910, February 24. Tracts involved herein, 90 acres, *selected* by company as *indemnity* under the above land grant.

" March 5. Selection thereof *certified* and *approved* by the Register and Receiver. (See Exhibits "D" and "E," R., 12-13.)

" June 25. Pickett Act, authorizing temporary withdrawals *of public lands* from "settlement, location, sale, or entry" (36 Stat., 847).

1911, November 25. Temporary *withdrawal* of said lands, included in Power Site Reserve No. 232; promulgated by General Land Office, December 9, 1911.

1915, January 16. Commissioner of the General Land Office holds for rejection and cancellation the above indemnity selection, because of the Power Site Reserve, *supra*.

" March 30. Secretary of the Interior *affirms* said decision of the Commissioner (this upon appeal taken by the company).

" May 27. Secretary of the Interior *denies* motion for *rehearing* filed by the company.

" June 3. Bill for injunction filed herein.